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**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

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**In the Matter of the Application of Columbus
Southern Power Company for Approval of
an Electric Security Plan; an Amendment to
its Corporate Separation Plan; and the Sale or
Transfer of Certain Generating Assets.**

Case No. 08-917-EL-SSO

**In the Matter of the Application of Ohio
Power Company for Approval of its Electric
Security Plan; and an Amendment to its
Corporate Separation Plan.**

Case No. 08-918-EL-SSO

**COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER
COMPANY'S
MEMORANDUM CONTRA MOTION TO COMPEL DISCOVERY FILED BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Columbus Southern Power Company and Ohio Power Company (collectively, "AEP Ohio" or the "Companies"), pursuant to Ohio Administrative Code ("O.A.C") 4901-1-12 and the Commission's May 25, 2011 Entry, hereby file their Memorandum Contra the motion to compel discovery filed by the Office of the Ohio Consumers' Counsel ("OCC").

INTRODUCTION

By its May 25, 2011 Entry, the Commission, among other things, shortened the time within which parties must respond to discovery requests to ten days.¹ On May 27, 2011, OCC served its first set of interrogatories and requests for production of documents upon AEP Ohio – this first set of questions was submitted before the Company's testimony was filed and responses were due on the same day that the Commission required the Company to file its testimony. As of the filing date of this Memorandum

¹ Entry at ¶13 (May 25, 2011).

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Contra, OCC has served upon AEP Ohio a total of eight sets of discovery requests, each of which include both interrogatories and requests for the production of documents.

Contrary to the inaccurate portrayal in OCC's motion that OCC has not had an adequate opportunity to engage in discovery and that AEP Ohio has been non-responsive to OCC's discovery requests, AEP Ohio to date has timely provided responses to the 1st, 2nd, 3rd, 4th, and 5th sets of OCC requests within the shortened 10-day timeframe established by the Commission's May 25 Entry (in addition to responding to two sets of questions from IEU during the same time period); the Company is presently working to provide timely responses to OCC's 6th through 8th sets as well.

In addition to the eight sets of written discovery requests already served, OCC also has noticed all four of AEP Ohio's witnesses for deposition. AEP Ohio promptly made all four witnesses available for deposition and, as of the filing of this memorandum contra, OCC has taken all four witnesses' depositions over the course of three separate days, June 16, 17, and 20. Thus, in addition to the information conveyed in numerous pleadings which explain AEP Ohio's position on remand as well as the 75 pages of written testimony, AEP Ohio has already provided more than 400 pages of written discovery responses in the remand proceeding and conducted depositions for all witnesses (which transcripts provide an additional 400 pages of discovery). While the number of discovery requests that OCC has already served is voluminous, the mass of information that AEP Ohio has compiled and provided to OCC in the very limited time that the shortened response time contemplates has been impressive. In any case, OCC's attempt to portray AEP Ohio as being non-responsive to discovery requests is completely unsupported.

With regard to OCC's first set of discovery requests that were served on May 27, 2011, the Companies did provide timely responses on June 6, 2011. The next day, on June 7, 2011, counsel for OCC, by email, advised AEP Ohio that, in OCC's opinion, "AEP has not fully responded to the OCC's first set of discovery."² AEP Ohio responded to OCC's communication, explained that it had responded to the requests in most respects, reiterated its reasons for objecting in some respects to the requests, and further explained that, with regard to certain document requests, AEP Ohio was unable, after a good faith search, to locate any documents responsive to those requests.³ It was also suggested by AEP Ohio counsel that OCC should complete its depositions of the Companies' witnesses before concluding that there was anything insufficient or inappropriate about the responses and objections. Nevertheless, before it had taken even one deposition, OCC filed the motion to compel on June 15, 2011. As noted above, OCC has conducted depositions of all four of the Companies' remand witnesses. Many issues raised during the depositions were fully explored and arguably moot some of the disputed requests, yet OCC prematurely raised the issues without trying to get answers to their questions through the deposition process and, thus, prematurely filed its motion to compel. It is also telling that OCC complains about the fact that AEP Ohio served similar discovery requests on OCC; it apparently does not subscribe to the philosophy of what is good for the goose is also good for the gander. In an even more disingenuous action, OCC has now asserted some of the same objections raised by the Company in its response (some of which are directly being challenged through OCC's motion to compel). The reality is that OCC is getting more than sufficient access to discovery with

² See Attachment 3 to OCC's Motion to Compel at 2.

³ *Id.* at 1.

respect to the filed testimony and narrow issues in this remand proceeding and, consequently, its motion to compel should be denied.

ARGUMENT

I. OCC's requests are unduly burdensome and overbroad

OCC has cited the Ohio Supreme Court's decision in *Ohio Consumers' Counsel v. Public Util. Comm.* (2006), 111 Ohio St.3d 300, to support its alleged entitlement to discovery in this proceeding. OCC dedicates most of its motion to a recitation regarding its right to conduct discovery about whatever it likes, in whatever terms it likes, and in unlimited amounts. A party's entitlement to discovery, however, is not unfettered, and must be curtailed if it is unduly burdensome or oppressive. Under the Civil Rules of Procedure (which are generally followed by the Commission regarding discovery matters, see R.C. 4903.082), Courts may limit discovery to prevent "fishing expeditions" where the requested discovery is broad and the party requesting the discovery fails to demonstrate a likelihood that relevant evidence will be obtained. *Drawl v. Cleveland Orthopedic Ctr.* (1995), 107 Ohio App.3d 272, 277-78 citing *Bland v. Graves* (1993), 85 Ohio App.3d 644, 620 N.E.2d 920. As an adjunct to OCC's misguided position regarding the bounds of discovery, it also dismisses (at 7) the Company's objections asserted as merely indicating AEP Ohio's intention to not respond to the OCC's discovery requests. AEP Ohio believes that, rather than simply responding to rhetoric with more rhetoric, it is more productive to review OCC's interrogatories requests for production of documents and AEP Ohio's responses and objections to them which OCC contends are inadequate or not well made. That review demonstrates that the Companies provided adequate responses to OCC's discovery requests, and they made appropriate

and reasonable objections to only the most objectionable requests. OCC ignores the narrow scope of the remand proceeding and glosses over the fact that it is conducting depositions of all Company witnesses and pursuing many other discovery requests beyond the objectionable requests that are addressed in their unfounded motion to compel.

II. AEP Ohio has adequately responded to OCC's 1st set of discovery requests

A. AEP Ohio's existing responses to the Interrogatories are sufficient

OCC's motion to compel identifies three interrogatories (INT-R1-001, R1-002, and R1-003) to which it contends the Companies responses and objections are inadequate or inappropriate. As set forth below, AEP Ohio submits that its existing responses (as further explained in exchanges between counsel) are adequate and sufficient.

Accordingly, OCC's motion to compel should be denied. Each request is discussed in turn below.

INT-R1-001:

Who prepared or assisted in the preparation of responses to the discovery requests in the Remand Proceeding (i.e. Identify the persons), stating for each person the discovery request for which he or she assisted in the response?

RESPONSE:

*See IEU INT-R1-001; where applicable a witness is listed
Prepared by: Counsel*

The response to IEU INT-R1-001, which was also served upon OCC (in addition to being served upon IEU and other parties), identified the four witnesses sponsoring pre-filed testimony for the Companies, Philip J. Nelson, Dr. Chantale LaCasse, Laura Thomas, and Dr. Anil Makhija. In the case of each of OCC's discovery requests, the

Companies have identified the witness responsible for the response, including for its preparation. In cases where counsel for the Companies have lodged an objection or have prepared responses (for example, with regard to requests that raise legal issues), "Counsel" is identified as being responsible for the response or objection. OCC's argument regarding this response is that "[n]aming a 'responsible witness' (AEP's answer) is not responsive to the interrogatory. The witness may not have participated in the preparation of the responses, and others may have been involved." OCC simply is incorrect.

The named witness is responsible for the response and for its preparation. It is a routine foundational examination question in practice before the Commission to ask whether a witness's testimony and exhibits were prepared by them or under their direction or supervision. The Commission has never required that a witness directly prepare each exhibit, table, figure or calculation within their testimony; nor has the Commission required every support person involved in helping to prepare an exhibit, perform a calculation, or assist in preparing a discovery response be haled before the Commission or subjected to deposition or other direct forms of discovery. Rather, each party must bear its burden of proof and burden of persuasion and, in turn, each witness must have sufficient knowledge and experience to sponsor and explain their exhibits and credibly support the conclusions and observations contained in their testimony.

OCC's motion to compel advances the idea that it can subject individual utility employees to discovery by virtue of some corollary or remote involvement in supporting a witness selected by the utility to appear before the Commission; ultimately, this leads to OCC's misguided notion that it can unilaterally enlist utility employees as deponents or

witnesses in Commission proceedings. The idea of compelling utility employees to be deposed or forced to testify is especially inappropriate when dealing with matters of policy and opinion. Only if there was specific factual information not known by an existing witness could OCC have a legitimate claim to try and involuntarily call a Company employee as a witness or deponent. The responsible witness can sponsor testimony and discovery prepared by the witness "or under their direction" with the help of subordinates and others without exposing those persons to discovery or being deposed, etc.

Regarding the confidentiality objection advanced by AEP Ohio under INT R1-001, discovery responses are coordinated under the direction of counsel and who counsel chooses to assist should not be discoverable. OCC is not entitled to commandeer Company's personnel to conduct discovery or present OCC's case. Moreover regarding INT-R-001, Counsel for AEP Ohio represented to OCC that there are no responsive documents that indicate who all helped with a particular question.

Unlike policy or opinion testimony, there are situations where individuals may possess unique personal knowledge of facts that are integral to the resolution of a factually-intensive dispute such as a complaint case and such individuals could conceivably be compelled to testify even if not offered voluntarily. But that situation is not present in this proceeding and, as such, the concept of involuntary participation by utility employees has no application here.

A party should bear its own burden of producing a witness for non-essential testimony such as opinion or policy testimony and should not be permitted to compel such testimony through the use of a subpoena or other discovery tools. Accordingly, AEP

Ohio's response to OCC INT-R1-001 of designating a responsible witness for each discovery request is appropriate and OCC is not entitled to compel information through the discovery process regarding the other utility employees who may have been involved in some supportive capacity in developing discovery responses. Indeed, O.A.C. 4901-1-19(A) suggests that listing the person responsible for the answer is not only permissible but is sufficient.

Finally and most notably, in response to the same discovery request posed by AEP Ohio to OCC, the entire response given by OCC on June 20, 2011 is "See individual responses to discovery. OCC Counsel prepared this response." In other words, OCC has taken the same approach as the Company in responding to the same question – even though it seeks to compel the Company to provide additional information. No further information is provided. Not only is this disingenuous on OCC's part, but it alone justifies denial of OCC's motion to compel regarding INT-R1-001.

INT-R1-002.

For each person whom AEP Ohio intends to call as a witness at a hearing in the Remand Proceeding:

- a. What are all the facts which provide the basis for each opinion on which the witness will testify?;*
- b. What is the witness' background and qualifications?;*
- c. What Documents were supplied to, reviewed by, relied on, or prepared by the witness in connection with his or her testimony (i.e. Identify the Documents)?;*
- d. What was agency or court, case name, and case number for all other proceedings in which the witness has testified on the same or a similar topic in the past ten years?; and,*
- e. What is the name and title of all persons who assisted in the preparation of the witnesses' testimony and how did they assist?*

RESPONSE:

a-e: See the pre-filed testimony filed in this case on June 6, 2011.

Prepared by: Counsel

OCC contends that AEP Ohio's response to Interrogatory No. R2 does not respond to subpart (c), (d), and (e). With regard to OCC's concern about subpart (c), which requests each witness's workpapers, those documents were provided and were subject to OCC's review and further examination at each witness's deposition. If OCC has other specific questions after reviewing the testimony concerning specific supporting documents, OCC can submit a more descriptive interrogatory to pursue that request. The existing response to subpart (c) is sufficient, especially given the opportunity to discuss those matters during the depositions.

With regard to subpart (d), there is no "similar" proceeding to this one – as OCC was advised by AEP Ohio's counsel in attempting to resolve this request. Nevertheless, Dr. Makhija did provide references to instances in which he previously testified in his prefiled testimony submitted in the initial round of hearings in this proceeding, as did Mr. Nelson. Neither Ms. Thomas nor Dr. LaCasse testified in the initial round of hearings in this proceeding. Nevertheless, Dr. LaCasse did provide in her testimony a list of prior proceedings in which she submitted testimony. Moreover, each witness was subject to examination at deposition examinations in which, if OCC desired, it could inquire into other proceedings in which the witness has testified, even though they did not contain issues "similar" to those in this proceeding.

With regard to subpart (e), each witness is responsible for the preparation of his or her testimony and the existing response is adequate for the reasons discussed above in connection with OCC INT R1-001. Notably, again, the OCC itself objected when AEP

Ohio posed the same question to OCC – based on the attorney-client privilege (without providing a privilege log).

INT-R1-003.

What Communications has AEP had concerning the Remand Proceeding with a representative of a party to the Proceeding, the Commission, and non-parties to the Proceeding (i.e. Identify the Communications, including all Documents that record such Communications)?

RESPONSE:

The Company objects to this request as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Company also objects to this request as being vague, overbroad and unduly burdensome. The Company also objects to a request to identify all communications, to the extent such communications are not documents and cannot be discovered through an interrogatory or request for production. The Company objects to this request to the extent it encompasses information that is confidential and privileged material. Regarding supplementation, Rule 4901-1-16(D)(5), OAC, does not require automatic supplementation for this response.

Prepared by: Counsel

The scope of this request is remarkable. It asks for the Companies to inventory and make, in essence, a log of every communication between "AEP", which presumably includes *every* employee and agent of the Companies and all of their affiliates, on the one hand, and *every* representative of: a party to this proceeding; the Commission; and non-parties, the sum total of which would include *anyone*, on the other hand. Even if it were reasonable to conduct such an inventory and prepare such a log, the expense in terms of time and effort would be substantial, and, in any event, could not reasonably be completed in the brief time allowed for an answer. That is the definition of over-breadth, vagueness, and undue burden. And for what possible constructive result? That is the definition of a "fishing expedition" that is most certainly not reasonably calculated to lead to the discovery of admissible evidence. In addition, if it were feasible to do, and it is not, once the investigation, inventory, and log were completed, the need to review for

privileged communications would have to be met. In any event, in addition to the stated objections in the response, OCC was informed by Counsel for the Companies that he was not aware of any responsive documented communication that exists after making a good faith search involving a few employees that would be the ones likely to engage in such communications. OCC's interrogatory was, and remains, objectionable on multiple grounds.

B. AEP Ohio's existing responses to the Requests for Production are sufficient

OCC's motion identifies four requests for production of documents (RPD-R1 through R3 and R5) for which it contends the Companies' responses and objections are inadequate or inappropriate. In OCC's counsel's June 7 e-mail, he only identified the Companies' response to OCC RPD-R1 as being inadequate, in his view. The difference appears in the title of Section B of the Memorandum Contra where the list of claimed inadequate responses is expanded to include OCC RPD-2, -3, and -5.

RPD-R1-001.

Please produce a copy of all Documents identified in response to OCC's First Set of Interrogatories (see specifically Interrogatories R2(c), R3, and R5 that request the Identification of Documents).

Response:

See Company response to OCC INT-R1-002(c), 003, and 005

Prepared By: Counsel

As noted above, in the discussion regarding the related interrogatories, AEP Ohio provided workpapers for each of the witnesses and, thus, fully responded to INT-R1-002(c), and INT-R1-003 is properly objectionable for the reasons provided in those objections and as reiterated and further explained above.

RPD-R1-002.

Please provide a copy of all formal and informal requests (e.g. interrogatories, data requests) submitted to AEP Ohio by the Commission in the Remand Proceeding, and provide the responses provided to the Commission. This is a continuing request to be updated when additional requests are submitted by the Commission and responses are provided to those requests.

Response:

See Company response to IEU RPD-R1-002

Prepared By: Counsel

AEP Ohio's response to IEU RPD-R1-002, which was served on OCC, provides in pertinent part that "[t]here have been no data requests from Staff and intervenors will be copied on any responses to formal discovery requests." In short, in addition to not raising this response as being inappropriate in the informal discussions between counsel for OCC and AEP Ohio, there does not appear to be any dispute, since AEP Ohio already has agreed to provide copies of data requests received from the Commission's Staff.

RPD-R1-003.

Please provide a copy of all discovery served upon AEP Ohio by other parties in the Remand Proceeding, and the responses to that discovery. This is a continuing request to be updated when additional requests are submitted by other parties.

Response:

See Company response to IEU RPD-R1-002

Prepared By: Counsel

Again, AEP Ohio's response to IEU RPD-R1-002, which was served on OCC, provides in pertinent part that "[t]here have been no data requests from Staff and intervenors will be copied on any responses to formal discovery requests." AEP Ohio has served copies of its responses to IEU discovery requests upon OCC, and will do the same with regard to other intervenors' discovery requests. In short, in addition to not raising this response as being inappropriate in the informal discussions between counsel for OCC and AEP Ohio, there does not appear to be any dispute.

RPD-R1-005.

Please provide a copy of all Communications (i.e., email, memos) between the Commission and AEP related to this proceeding. This is a continuing request to be updated when additional communications take place.

Response:

The Company objects to this request as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Company also objects to this request as being vague, overbroad and unduly burdensome. The Company also objects to a request to identify all communications, to the extent such communications are not documented and cannot be discovered through an interrogatory or request for production. The Company objects to this request to the extent it encompasses information that is confidential and privileged material. Regarding supplementation, Rule 4901-1-16(d)(5), does not require automatic supplementation of this response.

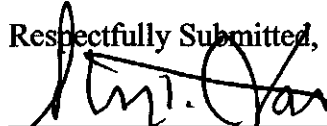
RPD-R5 is properly objectionable for the reasons provided in AEP Ohio's objections and as reiterated and further explained above in connection with INT-R3.

Further, although OCC did not informally attempt to resolve AEP Ohio's objections to RPD-R1-005, RPD-R1-005 is simply an only slightly but not materially reduced version of INT-R1-003 and the same objection applies with equal force as discussed above in connection with INT-R1-003.

CONCLUSION

The Commission should deny OCC's motion to compel, based on the foregoing reasons.

Respectfully Submitted,



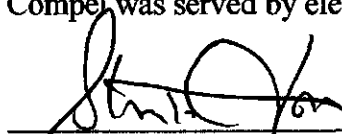
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CERTIFICATE OF SERVICE

I hereby certify that a copy of Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra Motion to Compel was served by electronic mail upon the individuals listed below this 22nd day of June, 2011.



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